UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALBERT J. VERA,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. H-04-1116
	§	
DIANA BARRERA MULET, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION

This employment dispute is before the court on Defendants' motion for summary judgment (Dkt. 119).[1] Having considered the parties' submissions, legal authorities, and oral argument, the court recommends that defendants' motion be granted and plaintiff's claims in this case be dismissed with prejudice.

I. FACTUAL BACKGROUND

The following facts are undisputed unless otherwise noted. Plaintiff Albert Vera taught at Jefferson Davis High School in the Houston Independent School District (HISD) for 38 years before his transfer to Jones High School prior to the

[1] In response to defendants' motion, plaintiff seeks reconsideration of this court's order denying his Rule 56(f) motion for continuance. Plaintiff still has not indicated what, if anything, was contained in defendants' supplementary disclosures that required further discovery, nor has he supported the conclusory assertion that the e-mail in "electronic format" is necessary to his claim. He did not move the court to compel production of the electronic information, nor did he seek discovery from the third-party service provider as suggested by defendants. Plaintiff's request for reconsideration is denied.

2003-04 school year. Vera alleges that he was transferred from Jefferson Davis to a less desirable position in retaliation for his speaking out about the need to maintain high standards for Hispanic students. Vera brings this case for retaliation in violation of his First Amendment rights pursuant to 42 U.S.C. § 1983. Defendants are HISD, Diana Barrera Mulet, principal of Jefferson Davis, Kaye E. Stripling, then general superintendent of HISD, and Erasmo Teran, superintendent of the North Administrative District of HISD (which as of June 2003 included Jefferson Davis).

On March 27, 2003, an e-mail was sent from an anonymous address (mg_ym_av@hotmail.com) to Stripling and LaVois. The text of the e-mail was addressed "To Whom It May Concern" and signed "A scared student." The e-mail alleged that Vera rubbed and touched girls in an inappropriate manner, and stated that it was time to do something about it "before it escalates any further." Stripling denies having seen the e-mail prior to institution of this lawsuit. LaVois forwarded the e-mail to Mulet and ordered an investigation into the sexual harassment allegation.

Mulet informed Vera about the e-mail and the investigation and directed him not to return to Jefferson Davis until the investigation was complete. Vera was assigned to an HISD testing center. The Equal Employment Opportunity (EEO) office of HISD directed the investigation. On March 31, 2003, an HISD Equal Employment Opportunity Specialist interviewed Vera at the district's EEO office.

Vera was given a hard copy of the e-mail, but not an electronic copy. As part of the investigation, the EEO investigators asked the students at Jefferson Davis to complete a survey on sexual harassment. The survey results included statements from students that Vera hugged and patted female students on the back or shoulder, touched their legs, and kissed them on the check. Some students reported feeling uncomfortable around him.

After the investigation, the EEO office concluded in a May 30, 2003 report that the allegations of actual harassment could not be confirmed, but that it was more likely than not that Vera's behavior had created an appearance of impropriety in his classroom and a widespread perception that he engages in sexual harassment of female students. The report was referred to LaVois for appropriate administrative action. The principal of Jefferson Davis prior to Mulet had raised concerns to Vera about his inappropriate relationships with female students in a 1992 letter.[2] Mulet was aware of this letter at the time of the investigation regarding the e-mail.

Vera was informed of the results of the investigation, and he requested to return to his job at Jefferson Davis. Mulet denied his request. Vera called LaVois's office for a copy of the report, but was told he would have to wait to obtain it from the new

---

[2] Vera's objection to this letter is overruled. The letter is not offered for its truth, and it was authenticated by Vera in his deposition. Vera Deposition, Exhibit A to defendants' motion ("Vera Dep."), at 140. In any event, the letter is not necessary to the court's decision.

district superintendent, Teran. Teran became superintendent of the newly consolidated North Administrative district, which included Jefferson Davis, in June 2003. Mulet and Teran decided that the best course of action was to transfer Vera to a different school. Vera contends that in order to facilitate the transfer to Jones, Teran and Stripling agreed that half of Vera's salary would be paid out of the district budget. Vera retired from his teaching position after completing the 2003-04 school year at Jones High School.

Vera claims that the e-mail from a "scared student" was actually sent by Mulet, and that Mulet, Stripling, and Teran joined together to force Vera out of Jefferson Davis. Defendants deny these claims and assert that there is no evidence to support them.

II. LEGAL STANDARDS

A. Summary Judgment

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *In re*

Segerstrom, 247 F.3d 218, 223 (5th Cir. 2001). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.,* 290 F.3d 303, 310 (5th Cir. 2002).

If the movant meets this burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)); *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). If the evidence presented to rebut the summary judgment is not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in the light most favorable to the nonmoving party. *Id.* at 255; *Hotard v. State Farm Fire & Cas. Co.,* 286 F.3d 814, 817 (5th Cir. 2002).

B. Qualified Immunity

The doctrine of qualified immunity protects public officers from suit if their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." *Linbrugger v. Abercia*, 363 F.3d 537, 540 (5th Cir. 2004) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The qualified immunity decision requires a two-step analysis. *Id.*; *Williams v.*

Kaufman Cty., 352 F.3d 994, 1002 (5th Cir. 2002). On a motion for summary judgment, the Court must first determine whether the undisputed facts, or the facts taken in the light most favorable to plaintiff, establish that the public official violated a clearly established constitutional right. *Linbrugger*, 363 F.3d at 540; *Williams*, 352 F.3d at 1002. If the answer is no, the inquiry is ended. If the answer is yes, the Court must next determine whether the official's conduct was objectively unreasonable under established law. *Linbrugger*, 363 F.3d at 540 (citing *Bazan v. Hidalgo Cty.*, 246 F.3d 481, 490 (5th Cir. 2001); *Williams*, 352 F.3d at 1002. The appropriate inquiry can be summarized as "whether the state of the law [at the time of the violation] gave [defendants] fair warning that their alleged treatment of [plaintiffs] was unconstitutional." *Williams*, 352 F.3d at 1003 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). An individual defendant's subjective state of mind is irrelevant to the qualified immunity inquiry. *Thomas v. Upshur Cty, Texas*, 245 F.3d 447, 457 (5th Cir. 2001).

C. First Amendment Retaliation

Vera alleges that defendants have retaliated against him in violation of the First Amendment of the United States Constitution. The First Amendment gives every citizen the right to freedom of speech. Section 1983 of Title 42 of the United States Code provides that a person may sue in federal court for an award of money damages

against any person who, under color of state law or custom, intentionally violates the person's rights under the Constitution of the United States.

In order to prevail on his § 1983 First Amendment retaliation claim, Vera must allege and show:

(1) he suffered an adverse employment action;

(2) he engaged in speech on a matter of public concern;

(3) his interest in commenting on the matter of public concern outweighs the defendants' interest in promoting efficiency; and

(4) his speech motivated the defendants' actions.

Finch v. Fort Bend Indep. Sch. Dist., 333 F.3d 555, 563 (5th Cir. 2003); *Southard v. Texas Brd. of Criminal Justice*, 114 F.3d 539, 554 (5th Cir. 1997) (citing *Mattern v. Eastman Kodak, Co.*, 104 F.3d 702, 705 (5th Cir. 1997)). If Vera meets his burden on these elements, defendants must prove that they would have taken the adverse employment action even absent the protected speech. *Beattie v. Madison Cty. School Dist.*, 254 F.3d 595, 601 (5th Cir. 2001).

In determining whether speech involved a matter of public concern, the court considers whether the public employee spoke primarily in his role as a citizen or primarily in his role as an employee. *Johnson v. Louisiana*, 369 F.3d 826, 830 n.6 (5th Cir. 2004) (citing *Connick v. Myers*, 461 U.S. 138, 147 (1983)). The court looks

to the content, form, and context of speech, as revealed by the whole record, in determining whether speech addressed a matter of public concern. *Id.*; *Finch*, 333 F.3d at 564. Only if the speech meets the test for matters of public concern does the court perform the balancing test, weighing his interest against the employer's interest in efficiency. *Johnson*, 369 F.3d at 831.

A plaintiff's subjective belief of retaliation is not sufficient to prove a First Amendment retaliation claim. *See Robertson v. Alltel Information Serv.*, 373 F.3d 647, 654 (5th Cir. 2004); *Douglass v. United Serv. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).

III. ANALYSIS

Defendants argue that Vera did not engage in protected speech, and his speech was not a motivating factor in the transfer decision. HISD also defends on the ground that there is no evidence of a policy that was the moving force behind the transfer, and the individual defendants assert qualified immunity. The court turns to each argument in turn.

A. Vera's Protected Speech

Defendants contend that Vera has alleged only two specific instances when he spoke out on a matter of public concern. The first was a May 2001 letter to LaVois regarding the naming of a school building sent before Mulet was employed at

Jefferson Davis, and the second was a complaint Vera made to the EEOC, and no one else, that Mulet was removing older, more experienced teachers. Neither of these examples of free speech could have led to the alleged retaliation because Mulet, Teran, and Stripling were not aware of them.[3] Therefore, the court need not determine whether these statements qualify as protected speech.

However, Vera's primary contention is that he engaged in protected speech when he objected to lowering standards for Hispanic students. Vera testified that he made several recommendations regarding the school, including creation of a program to raise the reading level of students; creation of a core curriculum; creation of a space at the school with resources for parents; establishment of standards for recognizing excellent teachers; and other suggestions related to making Jefferson Davis a cultural and education center for the Hispanic community.[4] Vera has presented an affidavit from his immediate supervisor at Jefferson Davis, Richard McCarthy, the chair of the Social Studies Department.[5] McCarthy testified that he is personally familiar with Vera's "persistent advocacy of having students of Hispanic background, the major portion of Davis students, be educated on par with students of

---

[3] Vera Dep., at 77, 93-94. Stripling was not a decision-maker in any event. *See infra at* 11.

[4] Vera Dep., at 36-37.

[5] Defendants' objection to the McCarthy declaration is overruled.

other backgrounds residing in more affluent areas of Houston."[6] Vera raised these concerns in a November 2002 letter to Mulet.[7] Vera testified that he raised these issues orally to Mulet on various occasions in her office or elsewhere.[8]

Although the protected status of speech is a question of law rather than fact, that determination must be based on the content, form , and context of the statements as revealed by the whole record. *Connick v. Myers,* 461 U.S. 138, 147-48 & n.7 (1983). The summary judgment record is not developed enough to reach a confident legal conclusion about the protected status of Vera's speech. On the one hand Vera's statements to Mulet about his grading practices did arise in the employment context and thus were made by Vera in his capacity as a teacher. On the other hand, it may be possible to interpret such statements as expressing a wider concern than just the conditions of Vera's employment, especially in light of other unspecified occasions when Vera claims to have publicly advocated holding students of Hispanic background to the same high standards demanded of non-Hispanic students. On this record the facts are too sparse to decide the "public" or "private" nature of Vera's

---

6 Declaration of Richard McCarthy, attachment 1 to Vera's response.

7 *See* Attachment 3 to Exhibit 2 to Declaration of Diana Barrera Mulet, Exhibit B to defendants' motion ("Mulet Declaration").

8 Vera testified that a lot of these conversations took place "in the front yard if we just happened to be there at the same time." Vera Dep., at 72.

speech. However, it is unnecessary to determine whether Vera has presented enough evidence to create a genuine issue of material fact on this point, because even assuming Vera was speaking as a citizen on matters of public concern, he has failed to identify any evidence that such speech played a role in his transfer, as explained below.

B. Causation

Vera must show that he was transferred because of his protected speech. Yet Vera candidly conceded in his deposition testimony that he had no evidence that the defendants acted in retaliation for his protected speech.[9] The summary judgment record amply supports this concession.

Stripling was not involved in any way in the decisions to investigate or transfer Vera. Nor were either Stripling or Teran aware of Vera's protected speech. Vera himself admitted that Teran, who did not begin his tenure as district superintendent

---

[9] Q: All right. Did – do you have any information or evidence that Diana Mulet got back at you to harm you for something you did or said?

A: Evidence, no sir.

* * *

Q: . . . Do you have any information that suggests that Dr. Stripling, Mr. Teran, Ms. Mulet, got back at you to cause you some sort of harm for something you did or said?

A: No, sir, no, sir.

Vera Dep., at 31-32.

until June 2003, was not aware of the protected speech on which Vera relies.[10] Stripling testified that she was not aware of Vera's advocacy to Mulet, and Vera has presented no evidence to the contrary.[11]

Regarding Mulet, Vera asks the court to infer retaliatory bias based solely on evidence that Mulet disapproved of his grading practices and repeatedly called him in to discuss the failure rate in his classes. In December 2002, Mulet placed Vera, a 38-year veteran, on an Intervention Plan for Teacher in Need of Assistance.[12] Pursuant to this Plan, Vera was required, among other things, to submit lesson plans a week in advance, review all assignments with an "appraiser," be observed by the appraiser in the classroom, and attend a professional development class. He apparently completed this plan successfully in early March 2003.[13] Vera also points to an incident in the previous school year during which Mulet recommended that he should strongly consider retirement, resignation, or transfer, but he does not recall the circumstances giving rise to this comment.[14] But, apart from his own subjective

---

10 Vera Dep., at 74.

11 Declaration of Kay E. Stripling, Exhibit C to defendants' motion, ¶ 7.

12 Attachment 1 to Exhibit 2 to Mulet Declaration.

13 Vera Dep., at 83.

14 *Id.* at 50-51.

belief, Vera can point to no evidence of a causal nexus between Mulet's apparent dissatisfaction with his grading practices and the transfer decision.

Of course, the defendants' stated reason for the transfer was the EEO investigation triggered by the anonymous e-mail from "a scared student." There is not one iota of evidence in this record that Mulet (or any other defendant) somehow fabricated, instigated, or played any role in generating this e-mail.[15] Nor is there any evidence that the e-mail was merely a pretext for Vera's transfer. Teran approved the decision to transfer Vera after consultation with Mulet. He based his decision on the May 20, 2003 EEO office report and the comments of students contained in it. Teran took no part in the initiation or conduct of the investigation. As stated above, Teran knew nothing of Vera's situation until June 2003. In light of the unchallenged findings of the EEO report, HISD administrators were clearly justified in taking some action, as even Vera grudgingly concedes.[16]

In the end, Vera's subjective belief of retaliation is not enough to create a genuine issue of material fact where there is compelling evidence of a non-retaliatory reason for the transfer. *See Douglass*, 79 F.3d at 1430. Therefore, all defendants are entitled to summary judgment.

---

[15] Vera Dep., at 23-25.

[16] Vera Dep., at 135-37.

C. Qualified Immunity

The first half of the qualified immunity determination is whether there has been a violation of a clearly established constitutional right. *Linbrugger*, 363 F.3d at 540. Because Vera has not met his burden on an essential element of his claim for § 1983 First Amendment retaliation, he cannot prove a constitutional violation and it follows that the individual defendants are entitled to qualified immunity.

D. HISD Liability

A local government entity such as HISD is not liable for the acts of its employees based on *respondeat superior*. In order to hold HISD liable, Vera must be able to show that an official HISD policy or custom was the moving force behind the constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Vera cannot do so. There is no evidence that HISD had a policy of lowering standards for Hispanic students and of transferring teachers that refused to comply to schools with a lower Hispanic population. An unconstitutional policy can be inferred from a single decision if taken by an official with policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988). The Board of Trustees is the sole policymaker for HISD. *Rivera v. Houston Indep. School Dist.*, 349 F.3d 244, 247-48 (5th Cir. 2003). Mulet, Stripling, and Teran are not HISD policymakers. While the defendants are decision-makers, absent an HISD policy, HISD can be liable

only if the board approved their decisions. *See id.* at 248; *Propatnik*, 485 U.S. at 129; *Beattie*, 254 F.3d at 601. It did not. HISD is entitled to summary judgment on this additional basis.

IV. Conclusion and Recommendation

For the reasons stated above, the court recommends that the district court grant defendants' motion for summary judgment.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas on December 21, 2005.

Stephen Wm Smith
United States Magistrate Judge